Office-Supreme Court, U.S.
FILED
SEP 8 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 532

RETAIL LIQUOR DEALERS ASSOCIATION OF LOUISIANA, INC, ET AL., *Petitioners,*

v.

LAWRENCE J. REYNOLDS, d/b/a LARRY AND KATZ, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

BENJAMIN H. DORSEY
Brookhart, Becker & Dorsey
1700 K Street, N. W.
Washington, D. C. 20006

RISLEY C. TRICHE
Triche & Sternfels
Napoleonville, Louisiana

Attorneys for Petitioners

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	5
Argument	7
Conclusion	10

APPENDICES:

A. Opinion and Judgment of the Supreme Court of Louisiana, November 8, 1965 ..... 1a, 23a
B. Opinion and Judgment of the Supreme Court of Louisiana, April 1, 1966 ..... 33a, 40a
C. Denial of Motion for Rehearing, May 2, 1966 ..... 52a

CITATIONS

CASES:

England v. Louisiana State Board of Medical Examiners, 246 F. Supp. 993 (1965), judgment affirmed 16 L. Ed. 2d 998 (1966) 9
Ferguson v. Skrupa, 372 U.S. 726, 10 L. Ed. 2d 93, 83 S. Ct. 1028 (1963) 8
Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35, 16 L. Ed. 2d 336, 86 S. Ct. 1254 (1966) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No.

RETAIL LIQUOR DEALERS ASSOCIATION OF LOUISIANA, INC, ET AL., *Petitioners,*

v.

LAWRENCE J. REYNOLDS, d/b/a LARRY AND KATZ, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

Petitioners, parties by intervention in the case, pray that a writ of certiorari be issued to review the judgment of the Supreme Court of Louisiana entered April 1, 1966.

OPINIONS BELOW

The opinions of the Supreme Court of Louisiana (Appendices A and B) are reported at 185 So. 2d 794, 809, — La. —.

JURISDICTION

The opinion and judgment of the Supreme Court of Louisiana, as to which certiorari is sought, were entered April 1, 1966, and a timely filed petition for rehearing was denied on May 2, 1966. On July 19, 1966, the time for filing this Petition was extended to September 8, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

Is the decision of the Court below correct in holding a State statute requiring a mandatory mark-up above cost by wholesalers and retailers of alcoholic beverages in Louisiana unconstitutional as violative of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States?

Is the decision below in accord with applicable decisions of this Court?

Is a State alcoholic beverage control statute unconstitutional under the Due Process Clause of the Fourteenth Amendment because the Court below found "It bears no real or substantial relation to the general health, morals or welfare of the people. At best it represents an ignoble flight from competition."?

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

U. S. CONSTITUTION:

Amendment 14

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty,

or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment 21

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

LOUISIANA STATUTE:

Act 290 of 1964.
(Now La. R.S. 26:211 *et seq.*)

PART VI. MINIMUM PRICES.

§ 211. Filing of schedules required

No wholesaler shall, after September 1, 1964, sell or offer to sell any alcoholic beverages until such wholesaler shall have filed with the Louisiana Board of Alcoholic Beverage Control a schedule in writing which shall contain, with respect to each item he proposes to sell, the exact brand or trade name, capacity of package, nature of contents, and proof. In addition, such schedule shall show the minimum price at which the wholesaler proposes to sell, which price shall be known as the wholesaler's list price, the minimum price at which the wholesaler's customers shall sell at retail in quantities of less than one case, and the minimum price at which the wholesaler's customers shall sell at retail in quantities of one case or more, which prices shall be known as the retailer's list price. The provisions of this Section shall not apply to any licensed wholesaler with respect to such distilled spirits and wines as has been purchased from another licensed wholesaler.

§ 212. Wholesaler's list price

The wholesaler's list price of distilled spirits shall not be in an amount less than his cost price, plus a markup of at least ten per cent of such cost price. The wholesaler's list price of wine shall not be in an amount less than his cost price, plus a markup of at least eighteen per cent of such cost price. The wholesaler's cost price shall be his actual net invoice cost price as shown by the duplicate invoice on file with the board, inclusive of bottling charges and all other charges paid for the distilled spirits or wines, plus all taxes, plus all transportation charges calculated on a minimum basis of not less than fifty cents per case. The provisions of this Section shall not apply to any licensed wholesaler with respect to such distilled spirits and wines as has been purchased from another licensed wholesaler.

§ 213. Retailer's list price

The retailer's list price of distilled spirits shall not be less than the retailer's cost price, plus, where sales are made in less than quantities of one case, a markup of at least twenty percent of the retailer's cost price, plus, where sales are made in quantities of one case or more, a markup of at least ten per cent of the retailer's cost price. The retailer's list price of wines shall not be less than the retailer's cost price, plus, where sales are made in quantities of less than one case, a markup of at least thirty per cent of the retailer's cost price, or plus, where sales are made in quantities of one case or more a markup of at least fifteen per cent of the retailer's cost price. The retailer's cost price shall be the wholesaler's list price, excluding municipal or parish gallonage tax on distilled spirits and wines.

§ 214. Amendments of schedules

Any wholesaler may amend his schedule on file with the board at any time, provided the amend-

ment does not reduce either the wholesaler's list price or the retailer's list price below the minimum prices provided in Sections 212 and 213 hereof. All amended schedules shall become effective immediately upon being filed, except that where such an amended schedule includes a new brand of alcoholic beverage not previously sold by such wholesaler the schedule shall not become effective for a period of thirty days after it has been filed with the board.

§ 215. Sale below list price unlawful

A. No wholesaler shall sell or offer to sell any alcoholic beverage to any retailer nor shall any retailer buy or offer to buy any alcoholic beverages from any wholesaler at a price below a wholesaler's list price.

B. No retailer shall sell or offer to sell any alcoholic beverages at a price below the retailer's list price.

C. All distilled spirits and wines owned by any retailer or wholesaler in Louisiana, after September 1, 1964, shall be sold by such wholesaler or retailer at prices not less than the first list price shown on the schedule filed by the wholesaler distributing such distilled spirits or wines after September 1, 1964.

Notwithstanding the provisions of this Section, any licensed wholesaler may sell any distilled spirits and wines purchased from another wholesaler for a price not less than the wholesale list price of the selling wholesaler.

STATEMENT OF THE CASE

This case, commenced by three major volume distributors of retail liquor against the Louisiana Alcoholic Beverage Control Board as three separate suits, originated in the 19th Judicial District Court of Louisiana. The actions were consolidated and petitioners,

an association of retail liquor dealers and individual small retail liquor dealers in Louisiana, were allowed to intervene as defendants. The suits attacked the constitutionality of the Louisiana statute (Act 290 of 1964), providing for the regulation of the wholesale and retail prices of alcoholic beverages sold in Louisiana, under both the 14th Amendment of the Constitution of the United States and Article I, Section 2, of the Louisiana Constitution, on the ground that such statute allegedly deprived the plaintiffs of equal protection of the laws and due process of law.

In essence, the challenged statute provides a mandatory minimum mark-up over cost at wholesale and at retail. The minimum price is a floor below which wholesaler and retailer may not lawfully sell. Eight other states have similar statutory schemes requiring the mandatory minimum mark-up of wholesale and retail liquor prices for the protection of the safety, welfare, health, morals and peace of the people of the State. (R. 374).

The District Court ruled that that statute was unconstitutional and permanently enjoined enforcement of the Act. The case was thereafter appealed to the Supreme Court of Louisiana. On November 8, 1965, that Court, in a 4 to 3 decision, reversed the judgment of the District Court and held that "the purpose of *temperance* . . . has a direct relationship with a minimum price control act. In other words, there is a direct relationship between the purpose—curtailing the consumption of liquor—and the means adopted to accomplish it. * * * We conclude that Act 290 of 1964 is reasonable and that it is a valid exercise of the legislative will under its police power for the protection of the safety, welfare, health, peace, and morals of the people of the State of Louisiana. Its minimum

price provisions, as stated supra, are definitely related to the purpose which the Act seeks to accomplish. Act 290 of 1964 violates neither the due process clause of the Louisiana State Constitution nor the Fourteenth Amendment to the United States Constitution." (R. 318, 320.)

Plaintiffs below thereafter filed a motion for rehearing which was granted. On April 1, 1966, the Court, in a 4 to 3 decision, reversed its previous holding and held that "It [the statute] bears no real or substantial relation to the general health, morals, or welfare of the people. At best, it represents an ignoble flight from competition. It violates the Due Process Clauses of the State and Federal Constitutions. We hold it unconstitutional." (R. 368.) Defendants below filed an Application for Rehearing on April 14, 1966, and on April 25, 1966, filed a Motion for Time to File Briefs in Support of the Application for Rehearing, citing the decision of this Court in *Joseph E. Seagram & Sons, Inc.* v. *Hostetter,* rendered April 19, 1966 (R. 395-397). The Application for Rehearing was refused and said Motion was denied, May 2, 1966, both without opinion.

ARGUMENT

As reiterated by this Court, Section 2 of the 21st Amendment to the Constitution of the United States bestowed upon the states broad regulatory power over the liquor traffic within their territories. *Joseph E. Seagram & Sons, Inc.* v. *Hostetter,* 384 U.S. 35. The Louisiana regulatory scheme respecting alcoholic beverages was enacted because the Louisiana legislature found:

> "Whereas, it is deemed necessary for the protection of the safety, welfare, health, peace and

> morals of the people of the state that all traffic in alcoholic beverages containing more than six per centum of alcohol by volume be regulated and controlled, and that the police power of the state be exerted so that said traffic may not cause injury to the economic well-being of the people of the state, . . ." Title 26, Louisiana Revised Statutes.

The statute held unconstitutional below fixes a mandatory minimum mark-up for wholesalers and retailers selling liquor in the State of Louisiana and prohibits sales below the minimum price. The statute upheld by this Court in the *Seagram* case basically operated to reduce prices at wholesale and retail, which could tend to increase consumption, while this statute increases prices at wholesale and retail which could tend to decrease consumption. Plaintiffs below readily admitted that the effect of the statute had been a reduction in the volume of their liquor sales. (R. 285-287.) It would therefore seem obvious that the Louisiana statute is even more clearly within the prerogative of a State legislature than the New York statute upheld in the *Seagram* case. What the Court below unabashedly did was to substitute its social and economic beliefs for the judgment of the legislature and ignored the teaching of *Ferguson* v. *Skrupa,* 372 U.S. 726, which this Court repeated in the *Seagram* case. Even if the Court below felt that the statute did not promote temperance, it should not have determined the statute unconstitutional, because there is "nothing in the Twenty-first Amendment or any other part of the Constitution [which] requires that state laws regulating the liquor business be motivated exclusively by a desire to promote temperance." *Seagram,* at 16 L. Ed. 2d 345.

Plaintiffs below have not been deprived of any Constitutionally protected right by the Act enacted by the Louisiana legislature. They are only required to price their liquor as every other liquor dealer does in the State of Louisiana in accordance with the statutory scheme. Control of liquor pricing by state legislatures is a sensitive area, and this Court has upheld the regulation thereof in *Seagram* and, prior thereto, had upheld state pricing legislation in other areas. 16 L. Ed. 2d 346. The Court below recognized that the plaintiffs below had the burden of demonstrating the constitutionality of the statute. (R. 362.) The Court then fell into error by substituting its notions of the social and economic consequences of the statute for that of the legislature and concluded that this substitution of judgment "discharged their [plaintiffs'] burden of demonstrating the unconstitutionality of the statute." (R. 368.) The extent of this fall from grace is even more marked since that very Court had previously upheld as not violative of the Due Process Clause of the 14th Amendment to the U.S. Constitution, a Louisiana statute barring issuance to or renewal by any person of a wholesale liquor license unless at all times through the license year he maintains sales to at least 20% of the retailers within his immediate trade area. An appeal has been taken to this Court, No. 229, October Term, 1966.

To paraphrase Judge Wright in *England* v. *Louisiana State Board of Medical Examiners*, 246 F. Supp. 993 (1965), judgment affirmed, 16 L. Ed. 2d 998 (June 20, 1966); the proper mandate of the Court below was to determine whether "it is irrational and unreasonable" for the Louisiana legislature to enact a mandatory mark-up statute for pricing liquor in the State.

Here, as in *England* "there has been no showing here that the state has done more than is necessary to protect the health of its citizens." 246 F. Supp. 997.

CONCLUSION

The April 1, 1966, decision of the Supreme Court of Louisiana flies directly in the face of this Court's decision in *Seagram* which had been brought to its attention, but ignored, in connection with the application for rehearing. As matters now stand, the construction placed on the 14th Amendment in *Seagram* by this Court is not the law of the land in Louisiana.

Petitioners pray that this petition for a writ of certiorari should be granted and the judgment of the Supreme Court of Louisiana reversed.

Respectfully submitted,

BENJAMIN H. DORSEY
Brookhart, Becker & Dorsey
1700 K Street, N. W.
Washington, D. C. 20006

RISLEY C. TRICHE
Triche & Sternfels
Napoleonville, Louisiana

Attorneys for Petitioners

September 8, 1966